No. 15832

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION NO. 117, AFL–CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), for enforcement of its order issued against respondents on July 17, 1957, following the usual proceedings under Section 10 of the Act. The Board's decision and

order (R. 9–79, 86–100)[1] are reported at 118 NLRB No. 84. This Court has jurisdiction of the proceedings since the unfair labor practices occurred at Seattle, Washington, within this judicial circuit.[2]

STATEMENT OF THE CASE

I. The Board's findings

The Board found that the Englander Company, Inc. (here called Englander) violated Section 8 (a) (2) and (1) of the Act by entering into a collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL–CIO (here called Teamsters), at a time when the number of employees at work was not representative of Englander's anticipated work force and by rendering other unlawful assistance to the Teamsters; and violated Section 8 (a) (3) and (1) by discriminatorily denying employment to Robert A. McDonald because of his refusal to join the Teamsters. The Board further found that since the Teamsters were unlawfully assisted, Englander violated Section 8 (a) (3) and (1) and the Teamsters violated Section 8 (b) (2) and (1) (A) of the Act, by agreeing to and

[1] Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

[2] The Englander Company, Inc., a Delaware corporation with its principal office in Chicago, Illinois, has plants for the manufacture of upholstered furniture and bedding in a number of states, including a plant in Seattle, Washington. Between February and May 1956, Englander shipped more than $50,000 worth of finished products from its Seattle plant to points outside the State. No jurisdictional issue is presented (R. 12–13; 116, 149–150).

maintaining a union security clause in their contract. The subsidiary facts upon which these findings rest may be summarized as follows:

A. Background: Englander acquires the Craftmaster plant

Englander manufactures upholstered furniture and bedding in a number of states and administers its operations in geographical divisions (R. 12–13; 116, 285–286). The Western Division, comprising the Pacific Coast states, is under the management of Vice-president John Sparrowk (R. 14; 116, 285–286). Prior to 1956 there were two manufacturing plants in the Western Division, one at Los Angeles and the other at Oakland, California, where Sparrowk had his office (R. 14; 116). The production and maintenance employees at both of these plants were covered by bargaining contracts with the Teamsters (R. 14; 125). During the latter part of 1955 Sparrowk made efforts to locate a third factory site for Englander in Seattle, Washington (R. 14; 126–127). Upon returning to Oakland, Sparrowk told Joseph Dillon, a representative of the Western Conference of Teamsters, the purpose of his trip to Seattle (R. 18; 127, 318). Dillon stated: "We expect to have your Seattle operation under contract on the same basis that we have it elsewhere" (R. 18, 89; 127).

In the early part of January 1956, Sparrowk and other Englander representatives began negotiations to lease the plant and purchase some of the inventory and equipment of Craftmaster, Inc., a Seattle firm also engaged in the manufacture of furniture and bedding (R. 15; 116–117, 287–288, 319–320). During the course of the negotiations, Sparrowk, who was inter-

ested in Craftmaster's work force as a "possible labor pool of people who had had previous experience in our type of operation," learned that Craftmaster had slightly more than 100 employees and had collective bargaining agreements with three unions (R. 15–17; 117–118, 155, 289, 323). About 71 of the Craftmaster employees were members of an Upholsterers union,[3] some 35 were members of a Carpenters union affiliated with the Washington-Oregon District Council of Furniture Workers,[4] and a few truck drivers were members of the Teamsters (R. 16; 155–157, 178, 192, 197–198). On January 9 Sparrowk met Teamsters Representative Dillon in a Seattle hotel at the latter's request (R. 18; 128, 291–292). Dillon introduced Sparrowk to W. L. Williams, a representative of the Teamsters' Seattle Local 117, and again stated that the Teamsters "expected to have the representation in whatever undertaking [Englander] elected to do here" (R. 18–19, 89; 292, 128, 312). Craftmaster terminated the employment of all but a few of its employees on the following day and Englander took possession of the plant on January 16 (R. 15; 116, 119, 212, 220, 243, 255, 260–261, 288, 378). Although Englander did not assume any contractual obligations of Craftmaster, it subsequently hired a substantial number of Craftmaster's employees and supervisors under circumstances set forth in detail below (R. 17; 117, 288–289).

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[3] Local 5 of Upholsterers International Union of North America, AFL–CIO (R. 13, 16).

[4] Local 3197, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (R. 13, 16).

B. The unfair labor practices

Vice-president Sparrowk was in Seattle for about a week prior to the execution of the lease and spent some time at the plant in connection with an inventory Craftmaster was taking (R. 19; 118–119, 130). On January 11 Sparrowk interviewed between 15 and 20 former Craftmaster employees who had come to the plant seeking employment with Englander (R. 19; 119–120, 121–122). After stating that he hoped to open the plant on January 16, Sparrowk told the applicants that Englander had been advised by the Teamsters that it "would expect to be recognized in this plant" (R. 19–21, 43; 294, 124). Sparrowk also referred the applicants to Teamsters Representative Williams for the purpose of discussing membership in the Teamsters and furnished some of them with the Teamsters' address (R. 19–22, 87; 124, 129, 294–295, 213–215, 245–246, 271–272, 322–323, 345–346, 370). According to applicant Daniel Walters, a witness for Englander, Sparrowk "gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 44; 345–346). Walters testified further that he had not asked Sparrowk for the Teamsters' address, that Sparrowk "just wrote the address on a slip of paper" (R. 44–45; 346). Walters, who was 74 and a member of the Furniture Workers union, applied for membership in the Teamsters on the same day (R. 45, 49; 344–345, 379). Other applicants construed Sparrowk's unsolicited proposal that they go to the Teamsters to discuss membership as meaning that clearance by, or

membership in, the Teamsters was to be a condition of employment at the plant (R. 45, n. 12, 48–49; 214–215, 245–246).[5]

Within the next two days the Upholsterers and Furniture Workers unions began picketing the plant (R. 16–17; 183, 198–199, 282, 378). On January 16, the day Englander signed the lease, Sparrowk told some 80 former Craftmaster employees about the Teamsters expectation that "they would have this plant" (R. 41–42; 33). Noting further that the picketing evidenced some disagreement with this, Sparrowk stated that he would like to start operating and give them work but could not while there was a union problem (R. 133–134).

[5] Three applicants testified that Sparrowk stated they would have to join or "clear through the Teamsters" as a condition of employment (R. 19–21; 214, 221, 245). Sparrowk admitted referring applicants to the Teamsters and furnishing them with the Teamsters' address, but denied making such a statement, claiming that he said he "was not in a position to tell them what they could or could not do from a union standpoint" (R. 39, 43–44; 294). Noting that Sparrowk was not a forthright witness, the Trial Examiner placed no credence in Sparrowk's asserted motive for referring applicants to Teamsters and found that he made no expression of neutrality to those applicants who testified at the hearing (R. 36–39, 43–45). The Trial Examiner further observed that in view of the "setting in which the interviews occurred, and the fact that the referrals were unsolicited and made upon his initiative," the applicants would naturally "interpret his statements as meaning that clearance by, or membership in, the Teamsters Local was to be a condition of employment at the plant" (R. 39–40, 48–49). However, the Trial Examiner found no substantial evidence that Sparrowk expressly voiced such a condition (R. 39–40).

On January 26 a representative of the Furniture Workers, John Truman, told Sparrowk that the Furniture Workers still represented the applicants formerly employed by Craftmaster and inquired whether Englander had taken over Craftmaster's contract with the Furniture Workers (R. 22, 89; 151–152). Sparrowk replied no, that "nation-wide" Englander "was under agreement to the Teamsters through a master agreement" and he was "bound by the master agreement" (R. 22–23, 89; 153–154). Sparrowk added that Englander had "good working relations" in the "plants covered by the Teamsters' agreements" and that he did not "want to jeopardize them by signing this plant to another organization" because Englander "would be subject to reprisals by Teamsters in other locations" (R. 23, 89; 154). On February 3 Sparrowk turned down Truman's further request for a consent representation election to be conducted by the Board, because he was "under an agreement with the Teamsters" (R. 23, 89–90; 154–155, 157).

On February 6 the Englander home office in Chicago telephoned Sparrowk that it was forwarding a contract signed by the Teamsters for the Seattle plant (R. 34–35, 89; 142, 303, 319). This contract which Sparrowk signed, without reading in full, on February 15, was little more than a duplicate of the one covering Englander's Los Angeles plant, even to the extent of bearing execution date, October 1, 1955, and effective date, December 1, 1955—dates prior to the acquisition of the Seattle plant (R. 33, 36, 90; 136–141, 308, 361–365). The contract also contained a union

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security clause making membership in the Teamsters on the 31st day of employment a condition of continued employment (R. 34, 88; 361–362).[6] Sparrowk did not negotiate contract terms with the Teamsters and the record contains no evidence of any contract negotiations between the Teamsters and any other Englander official (R. 60, 90; 282–283).

Between January 18 and February 1 Sparrowk hired three former Craftmaster supervisors, employing J. E. Hunt as factory manager, William Moore as factory foreman, and "Red" Henry as shipping department foreman (R. 17; 130–132, 302, 316–317, 320). As of February 1 Sparrowk had only eight nonsupervisory employees and had not yet begun production on any substantial scale (R. 25; 149, 280–281, 371–378). On February 10 a Teamsters representative telephoned former Craftsmaster employee Testerman at her home to ask if she wished to go to work at the Englander plant on the following Monday, February 13 (R. 25;

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[6] Article II of the contract read (R. 361–362):

As a condition of continued employment, all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment or the effective date of this clause, whichever is later. The failure of any employee to become a member of the Union at such required times shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union membership was available to such employee on the same terms and conditions generally available to other members, to forthwith discharge such employee. Further, this failure of any employee to maintain his union membership in good standing as required herein, shall, upon written notice to the Employer to such effect, obligate the Employer to discharge such employee.

220–221, 225–227). When Testerman inquired if the labor dispute was settled, the Teamster representative replied that the Teamsters "had a contract" at the plant and that the picket line of the Upholsterers and Furniture Workers "wasn't legal" (R. 25; 227). Testerman reported this conversation to representatives of her union, the Furniture Workers (R. 25; 227–228, 186). Upon receiving similar reports from other former Craftmaster employees, the Furniture Workers notified its membership to be at the plant on February 13 (R. 25–26; 162, 186–187).

Early on the morning of the 13th about 60 former Craftmaster employees came to the plant in search of employment. Approximately half were members of the Furniture Workers and the others of the Upholsterers. Representatives of both unions were present and also Teamster Representative Williams. When the plant doors opened, the job seekers and union representatives entered, with Truman of the Furniture Workers leading the members of his union (R. 25–26; 163–165). Sparrowk summoned Truman and Williams to Factory Manager Hunt's office and rebuked Truman for bringing jobseekers into the plant (R. 26; 165, 172, 176, 184–185, 300–301). At this point William Evans, another Furniture Workers representative who had overheard the "loud talking," entered the office to tell Sparrowk and Hunt that "there was a misunderstanding because, if anybody was responsible for the members of Local 3197 [the Furniture Workers] being down there to go to work that morning, it was the Teamsters, and specifically Mr. Wil-

liams and others of his staff whom I don't know" (R. 26; 185, 187). Evans also expressed the view that "apparently Mr. Williams is acting as your personnel manager" (R. 26, 89; 166, 187). Factory Manager Hunt replied that Williams "had the right to call these people inasmuch as the Teamsters held an agreement with the Englander Company" (R. 26, 89; 166, 188–189).

After Sparrowk told the applicants that the plant was ready to open for production, a large number of them went to the Teamsters' office later that day and the next and applied for membership (R. 28–30; 229–234, 247–248, 265–266, 329, 352–355).[7] At the Teamsters' request, they also signed a document which provided that (R. 30, 55, 90; 229–234, 248, 265–267, 332–333, 366–369):

> We the undersigned former employees of Craftmaster, Inc., do hereby agree to revoke any other Union representation in which I formerly participated as a member and do hereby accept as a new employee of the Englander

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[7] Shortly after Hunt's statement that the Teamsters had an agreement with Englander, both the Furniture Workers and the Upholsterers held meetings of their members who had been in Craftmaster's employ (R. 28–29; 167–169, 202). The Furniture Workers advised its members, who had been out of work for over a month, to join the Teamsters if that was necessary to go back to work (R. 29; 174–175, 191–192). The Upholsterers reported to its members that their status had been settled by a "deal" between the parent body of the Upholsterers and Teamsters (R. 28–29; 204–205). Teamster Representative Williams addressed the Upholsterers' meeting and spoke about the Teamsters' pension and insurance programs (R. 28–29; 204). Both the Furniture Workers and the Upholsterers also withdrew their picket lines at the plant (R. 17, 29; 132, 168, 191).

> Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company and do hereby agree to become a member of Warehousemen's Union Local 117 immediately upon going to work for the Englander Company.

Englander hired six employees on the 13th and began production on February 14, hiring 60 employees on that date, an additional 18 on February 15, and 4 more on the following day, bringing its nonsupervisory payroll to 96 employees as of February 16 (R. 28, 30; 372–378, 149, 280–281).

One of those hired on February 16 was Josephine Griffin, a member of the Furniture Workers who had not been employed by Craftmaster (R. 31; 250, 254, 377). Griffin had previously applied for employment to Factory Foreman Moore on February 14 (R. 31, 87–88; 250–252). Moore told her a job was available, "but first you have to get it straightened out with the Teamsters". When Griffin asked Moore whether she would be employed "if I join the Teamsters", Moore replied in the affirmative (R. 31, 87–88; 252). Griffin signed an application for membership at the Teamsters' office the same day and thereafter entered Englander's employ (R. 31–32; 253–254).

On February 20 Robert A. McDonald, a former Craftsmaster employee, applied to Foreman Henry for employment (R. 32; 255–257). Henry said he had no job, but telephoned McDonald on the following evening that a job was available and McDonald

"would have to clear through the Teamsters" (R. 32, 88; 256–257). Replying that he "would like to think it over", McDonald made an appointment with Henry for February 23 (R. 32; 257). McDonald came to the plant on that date, but spoke to Factory Foreman Moore instead of Henry (R. 32; 257–258). After explaining the duties of his job Moore told McDonald that he "would have to join the Teamsters." McDonald refused, stating: "Why join the Teamsters when the Carpenters & Joiners have the furniture plants". Although Moore asked why he should be "the only one not to join the Teamsters when everybody else has," McDonald repeated his refusal. Moore then said, "Well, I guess we can't do any business" (R. 32, 88; 258). McDonald did not enter Englander's employ (R. 32; 258–259, 372–378).

II. The Board's conclusions and order

Upon the foregoing facts and the entire record, the Board concluded that Englander had violated Section 8 (a) (2) and (1) of the Act by referring job applicants to the Teamsters under the circumstances of this case, by entering into a contract with the Teamsters prior to the time a representative number of employees had been hired, and by the statements of foremen Moore and Henry to employees Griffin and McDonald. The Board also concluded that because the Teamsters was an assisted union, the union security clause in respondents' contract was violative of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act. And, finally, the Board concluded that Englander had discriminatorily

denied employment to McDonald in violation of Section 8 (a) (3) and (1) of the Act.

The Board ordered respondents to cease and desist from the unfair labor practices found and from in any other manner infringing upon employees' exercise of their rights under Section 7 of the Act. The cease and desist provisions of the Board's order also enjoin Englander from recognizing the Teamsters, and both respondents from giving effect to their contract, unless and until the Teamsters shall have been certified as the representative of Englander's employees. Affirmatively, the Board's order requires Englander to offer McDonald employment with back pay, to withdraw and withhold recognition from the Teamsters unless and until certified, and requires both respondents to post an appropriate notice (R. 91–100).

ARGUMENT

I. Substantial evidence supports the Board's finding that Englander violated Section 8 (a) (2) and (1) of the Act by supporting the Teamsters and violated Section 8 (a) (3) and (1) by denying employment to applicant McDonald because of his refusal to join the Teamsters

The Board's finding that Englander assisted and supported the Teamsters, is fully warranted by the record. As described *supra,* pp. 5–6, on January 11 Vice-President Sparrowk told job applicants that the Teamsters expected to be recognized in the plant. Although aware that the job seekers were members of the Upholsterers and Furniture Workers unions, Sparrowk referred them to the Teamsters to discuss membership in that organization and furnished them with the Teamsters' address. The impact of this

conduct upon the applicants is shown by the fact that several of them construed Sparrowk's unsolicited proposal that they discuss membership in the Teamsters as meaning that clearance by, or membership in, the Teamsters was to be a condition of employment at the plant. Indeed, applicant Walters lost no time in joining the Teamsters immediately after Sparrowk gave him "the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 45, 50 n. 15; 346, 379).

The Board found that Sparrowk did not expressly condition employment upon membership in, or clearance by, the Teamsters. However, in view of Sparrowk's fear that Englander "would be subject to reprisals by the Teamsters in other locations" if the Teamsters did not have their way at the Seattle plant, the Board concluded that his purpose in referring applicants to the Teamsters was to "provide that organization with an opportunity to wean the job applicants away from other unions, in a climate of implied approval by Englander" (R. 38, 49). The circumstance that such intimidation was subtle rather than direct does not excuse Sparrowk's unsolicited intrusion upon the employees' right to free self-organization. "Intimations of an employer's preference, though subtle, may be as potent as outright threats" (*N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 599–600). These individuals had just been discharged by Craftmaster and were dependent upon Sparrowk's approval for an opportunity to resume employment at the plant. In this setting, we submit, the Board prop-

erly concluded that the referral of applicants to the Teamsters was for the purpose of encouraging them to join the Teamsters and was an unlawful act of assistance in violation of Section 8 (a) (2) of the Act. As this Court has observed (*N. L. R. B.* v. *L. Ronney & Sons,* 206 F. 2d 730, 734–735): "Under that section an employer must refrain from all interference with union activities. He must maintain a strictly neutral attitude. *Harrison Sheet Steel Co.* v. *N. L. R. B.,* 7 Cir., 194 F. 2d 407. An employer does not observe such neutrality where, as here, he takes it upon himself to inaugurate a membership drive among his employees by the union of his preference."

Furthermore, other representatives of management openly coerced applicants into joining the Teamsters. Thus, Foreman Moore told applicant Griffin on February 14 that she would "first have to get it straightened out with the Teamsters" as a condition of employment and would have a job if she joined the Teamsters (R. 31, 87–88; 251–252). Similarly, on February 21 Foreman Henry told applicant McDonald that he would have to clear through the Teamsters as a precondition to receiving a job (R. 32, 88; 256–257). Foreman Moore also told McDonald he would have to join the Teamsters if he wanted a job with Englander, and upon McDonald's refusal stated, "Well, I guess we can't do any business" (R. 32, 88; 258). This actual or threatened discrimination in employment to aid the Teamsters not only suffices in itself to sustain the Board's finding of unlawful support, but establishes also that the denial of employment to McDonald was because of his refusal to join

the Teamsters and hence was violative of Section 8 (a) (3) and (1) of the Act.[8] *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 273, 278; *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 40–42; *N. L. R. B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *L. Ronney & Sons, supra,* 206 F. 2d at 735; *Harrison Sheet Steel Co.* v. *N. L. R. B., supra,* 194 F. 2d at 410.

Before the Board Englander sought to avoid responsibility for the statements of Factory Foreman Moore, Shipping Department Foreman Henry, and Factory Manager Hunt, by asserting that these individuals had no authority to bind the Company. However, the record shows that all three had authority responsibly to direct the work of employees at the Seattle plant and exercised such authority (R. 18;

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[8] The Board properly rejected Englander's contention that it was prejudiced by the Trial Examiner's ruling permitting the General Counsel to amend the complaint to include an allegation as to the discriminatory refusal to employ McDonald. Section 10 (b) of the Act provides that a "complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." Although the Trial Examiner gave Englander an opportunity to apply for additional time to prepare its case against the McDonald allegation (R. 87, n. 2; 113–114), Englander failed to do so. Moreover, all of the issues were fully litigated at the hearing. Hence, Englander's "argument must fail because, all else aside, 'there was no showing of surprise which may have hampered presentation of respondent's defense on this aspect of the case.'" *N. L. R. B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C. A. 3). Accord: *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 349–350.

130, 131–132, 263, 316–317, 320–322). In addition, Foreman Moore had authority to hire and fire on and after February 14 when his statements to Griffin and McDonald were made (R. 336, 131–132, 321). Hence, they were all clearly supervisors within the meaning of Section 2 (11) of the Act, as the Board found (B. A. 18), and their conduct is attributable to Englander. *I. A. M.* v. *N. L. R. B.,* 311 U. S. 72, 80; *N. L. R. B.* v. *Texas Independent Oil Co.,* 232 F. 2d 447, 450 (C. A. 9); *N. L. R. B.* v. *Geigy Company,* 211 F. 2d 553, 557 (C. A. 9), certiorari denied 348 U. S. 821, and cases there cited.[9]

Englander also contended that Foreman Moore's statements to Griffin and McDonald, to the effect that these applicants would have to join the Teamsters as a condition of employment, were permissible under the union-security clause of its contract with the Teamsters because Moore did not specify when they would have to join that organization. But, as we show *infra,* pp. 24–25, the union-security clause with an assisted union was itself unlawful and therefore unavailable as a defense to threatened or actual discrimination in employment.

In addition to encouraging applicants to join the Teamsters, Englander also assisted that union by making an agreement with it before a representative

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[9] Moreover, Section 2 (13) of the Act specifically provides that in "determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

number of employees had been hired. The Board's finding that Englander and the Teamsters had an agreement prior to February 14, 1956, has a reasonable basis in the record. During the fall of 1955 and again on January 9, 1956, Teamster Representative Dillon informed Sparrowk that the Teamsters expected to have Englander's Seattle operation under contract on the same basis as it had other Englander plants (R. 18, 89; 127, 292). This expectation met with no opposition from Sparrowk, since he did not want to "jeopardize * * * good working relations" with the Teamsters at the Los Angeles and Oakland plants and feared that Englander "would be subject to reprisals by Teamsters in other locations" if he signed a contract for the Seattle plant with another union (R. 23, 89; 154). Thus, even before the lease was executed on January 16, the question of representation at the Seattle plant had been predetermined by the established relationship between Englander and the Teamsters elsewhere.

Following the execution of the lease, but prior to February 14—when a substantial number of employees was hired and production commenced—both Englander and the Teamsters made frequent references to an agreement between them covering the Seattle plant. While discussing representation at the Seattle plant with Furniture Workers' Representative Truman on January 26, Sparrowk stated that nationwide Englander was "under agreement to the Teamsters through a master agreement" and that he was "bound by the master agreement" (R. 23, 89;

153–154).[10] On February 3 Sparrowk refused to consent to a representation election at the Seattle plant on the ground that he was "under an agreement with the Teamsters" (R. 23, 89–90; 157). On February 13 when the Furniture Workers protested that Teamster Representative "Williams is acting as your personnel manager," Factory Manager Hunt replied that Williams had a right to ask job applicants to come to the plant because the "Teamsters held an agreement with The Englander Company" (R. 26, 89; 166, 187, 189). Similarly, on February 10 the Teamsters telephoned applicant Testerman to ask if she wished to go to work and told her that they "had a contract" at the plant (R. 25, 90; 223, 227).[11] And, finally, as early as February 13, the Teamsters asked Englander job applicants to sign a document which recited that

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[10] There is, and could reasonably be, no contention that the Seattle plant was merely an accretion to the Los Angeles and Oakland bargaining units. Apart from the hundreds of miles separating these plants, both Englander and the Teamsters maintained before the Board that there was no "master agreement" between them covering the Seattle plant. Respondents asserted that their references to a contract pertained only to a "pattern form of contract" which the Teamsters had with Englander elsewhere. But the basic facts remain that respondents got together prematurely and agreed to have this "pattern form of contract" at the Seattle plant before the plant opened for production or a majority of the employees had been hired.

[11] Before the Board the Teamsters attempted to explain away the Testerman incident by asserting that this reference was to a jurisdictional agreement between the Teamsters and the Upholsterers union. However, since Testerman belonged to the Furniture Workers' union and not to the Upholsterers (R. 227), it is difficult to see why such an agreement should be of any concern to her or what occasioned the Teamsters' comment.

Section 7 of the Act guarantees to employees the right to "bargain collectively through representatives of their own choosing." Section 9 (a) further provides that "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining * * *" (emphasis supplied). The Act thus adopts "the principle of majority rule * * * a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess. p. 13." *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324, 331. Here, the majority of employees was effectively foreclosed from selecting its bargaining representative or making known its wishes as to the terms or conditions of employment which the bargaining representative was authorized to seek on its behalf. Such a result is plainly inconsistent with the Act's principle of majority rule and its basic policy of affording employees the fullest freedom in the exercise of their right to bargain through representatives of their own choosing.

Moreover, the premature contract placed the Teamsters in a position of prestige and power which facilitated its recruitment of members among the Englander applicants. Following Factory Manager Hunt's statement on February 13 that the Teamsters had a right to ask applicants to come to the plant because it had a contract with Englander, the job

seekers flocked to the Teamsters Hall to apply for membership en masse (*supra,* p. 10).[13]

Indeed, even if (contrary to what we have shown) the record did not justify the Board's finding that such an agreement actually existed prior to February 14, Englander's repeated references to a contract with the Teamsters led the applicants to believe that one did exist and hence were equally effective in enhancing the Teamsters' status and aiding its recruitment campaign. Such assistance and support is not only manifestly unlawful but, as the Board has previously had occasion to call to Englander's attention (*The Englander Company, Inc.,* 114 NLRB 1034, 1042), "is 'aggravated where, as here, the agreement that grants recognition also requires the covered employees as a condition of employment to join and pay dues to a labor organization they have not freely chosen.' "

Before the Board, both Englander and the Teamsters challenged the evidentiary basis for the premature contract finding, asserting that it was possible to draw different inferences from certain incidents in the record. However, "the Board was not obliged to consider the facts and incidents * * * separately and in isolation. It had a right to consider them

[13] That they may have done so on the advice of their own union representatives to do whatever was necessary to obtain employment at the Englander plant, does not alter Englander's role in assisting the Teamsters. The Furniture Workers had picketed the plant for over a month and abandoned their protest only after Englander had made it clear that it would deal with the Teamsters and no other union (*supra,* p. 10).

compositely and to draw inferences reasonably justified by their cumulative probative effects." *N. L. R. B.* v. *Radcliffe et al.,* 211 F. 2d 309, 313 (C. A. 9), certiorari denied 348 U. S. 833. Considering Englander's total conduct—including Sparrowk's referral of applicants to the Teamsters, the statements of its supervisors conditioning employment upon membership in the Teamsters, the discriminatory denial of employment to applicant McDonald because of his refusal to join the Teamsters, as well as the pre-February 14 references to "an agreement with the Teamsters"; the record establishes a pattern of assistance and support more than sufficient to sustain the finding of a Section 8 (a) (2) violation.

II. The Board properly found that because the Teamsters was an assisted union, Englander violated section 8 (a) (2), (3) and (1) and the Teamsters violated section 8 (b) (2) and (1) (A) of the Act, by agreeing to and maintaining a union security clause in their contract

As noted *supra,* pp. 7–8, the contract between Englander and the Teamsters contained a union security clause making membership in the Teamsters on and after the 31st day of employment a condition of continued employment at the Seattle plant. The Board's conclusion that the execution and maintenance of this clause were violative of the Act, is manifestly proper.

Section 7, as implemented by Section 8 (a) (3) and 8 (b) (2), was "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood" (*Radio*

fficers' Union v. *N. L. R. B.*, 347 U. S. 17, 40). The le limitation upon this right is found in the proviso Section 8 (a) (3), which permits an employer and labor organization to make a union security agreeent if the labor organization is "not established, aintained, or assisted by any action defined in ction 8 (a) of this Act as an unfair labor pracce." Since the Teamsters was an illegally assisted ion, respondents' union security clause did not meet is statutory requirement and was therefore invalid.[14] *A. M.* v. *N. L. R. B.*, 311 U. S. 72, 75; *N. L. R. B.* *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–5. By executing and maintaining such a clause, spondents respectively violated Section 8 (a) (3) d (1) and 8 (b) (2) and (1) (A) of the Act. *L. R. B.* v. *Knickerbocker Plastic Co.*, 218 F. 2d 7, 919–920, 923–924 (C. A. 9); *N. L. R. B.* v. *Gottied Baking Co.*, 210 F. 2d 772, 779–780, 782 (C. A. ; *N. L. R. B.* v. *F. H. McGraw Co.*, 206 F. 2d 635, 1 (C. A. 6); *Red Star Express Lines* v. *N. L. R. B.*, 6 F. 2d 78, 81 (C. A. 2).

Respondents contend that there is no evidence that e clause was enforced or intended to be enforced. view of the discrimination against applicant Mcnald and the activity of Englander's supervisors

[14] As the Board noted (B. A. 63), the proviso to Section 8 (a)) also imposes the requirement that the labor organization be ne representative of the employees as provided in Section 9) in the appropriate collective-bargaining unit covered by ch agreement when made." For the reasons discussed *supra*, . 13–24, it can scarcely be said that the Teamsters represented uncoerced majority or that the agreement fulfilled this atutory condition.

in conditioning employment upon membership in the Teamsters, this argument is plainly without foundation. In any event, the execution or maintenance of an illegal union-security agreement, "even apart from its actual enforcement, constitutes 'discrimination in regard to hire'" or tenure of employment "and hence falls squarely within the prohibition of Section 8 (a) (3)." *N. L. R. B.* v. *Gottfried Baking Co., supra,* 210 F. 2d 779–780. See also, *Eichleay Corp.* v. *N. L. R. B.,* 206 F. 2d 799, 803 (C. A. 3); *Red Star Express Lines* v. *N. L. R. B., supra,* 196 F. 2d at 81; *N. L. R. B.* v. *McGraw Co., supra,* 206 F. 2d at 641. For, as the Second Circuit stated in the *Red Star* case, "the mere existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union."

Nor is there merit to the Teamsters' further argument that the existence of the clause was not an unfair labor practice because none of the employees knew about it prior to February 15 or 16.[15] This argument is premised on the erroneous assumption that the clause was invalid merely because the contract was premature and that a valid union-security contract could have been executed on or after February 15. However, as shown *supra,* p. 12, the Board's finding of illegal assistance rests, not only on

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[15] The record casts doubt on the accuracy of the assertion that none of the applicants knew about the clause prior to February 15 (R. 205–206, 234, 271–272).

e premature contract, but also upon other acts of sistance beginning on January 11, and continuing rough February 23. The effect of this assistance mained undissipated and tainted the clause with egality throughout the entire term of the contract.

CONCLUSION

For the reasons stated, it is respectfully submitted at the Board's order should be enforced in full.[16]

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APRIL 1958.

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[16] In its answer to the Board's petition for enforcement ara. 6), the Teamsters assert that "the scope of the Board's der has no reasonable relation to the offenses found, or to the elihood of their recurrence." The Teamsters raised no ob- tion before the Board to the scope of the order, which was bstantially the same as that recommended by the Trial Ex- iner. It is accordingly precluded from making any such jection now. *N. L. R. B.* v. *District 50, etc.*, 355 U. S. 453, 3–464; *N. L. R. B.* v. *Giustina Bros. Lumber Co.* (C. A. 9), ebruary 28, 1958, 41 LRRM 2711.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from all or any of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1958